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No. 72-258

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In the Supreme Court of the United States

OCTOBER TERM — 1972

DAVID LEHMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

REPLY TO BRIEF FOR THE UNITED STATES IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

Nowhere in its brief in opposition to the Petition for Certiorari has the government denied that a distinct Fourth Amendment violation occurred when the two Internal Revenue Agents, over the Petitioner's specific objection, deliberately reviewed two additional unreported patient cards just prior to Petitioner's alleged confession. The government asserts that the agents' conduct, while not condoned by either of the lower courts, was merely harmless error, since the agents had prior knowledge of Petitioner's alleged unreporting. (G.Br. 5, 9)[1] Of utmost significance, how-

ever, is that the government, in addition, does not contest that *prior* to this event, the Special Agent, *without asking the doctor whether he could look at them, seized the* Petitioner's records and proceeded to pull eleven other unreported patient cards. (Pet. 6, 10)[2] Since these eleven cards form the basis of the agents' prior knowledge of Petitioner's alleged unreporting, they stand as an unstable foundation for the Court of Appeal's invocation of the *de minimus* maxim (17a).

A careful examination of the crucial aspects of the interview reveals that except for the first two cards, Petitioner never consented to the review of his records and that the agents unduly pressured the doctor into allegedly confessing. At the agents' insistence, Petitioner initially pulled two patient cards from his files; one was recorded in his cash receipts book, the other was not. After questioning Dr. Lehman why this card was not recorded, Special Agent Barrett, *without asking the doctor if he could look at them,* took the records, pulled another card which was unreported and then proceeded to pull an additional ten unreported cards in succession.

After *each* of the thirteen cards was analyzed, Agent Barrett forcefully and continually questioned Dr. Lehman, demanding explanations, and making a variety of insinuations ranging from the doctor being a drug addict and chasing other women to keeping a double set of books. (App. 378-80, 567-68, 382-85, 570-71, 387-89, 574, 73, 391, 575) The doctor denied each of these assertions and requested advice from the agents. While the government asserts that Special Agent Barrett interpreted Petitioner's question as a request for advice on whether to make an

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[1] Citation is to Government's Brief in Opposition to Petition For Writ of Certiorari.

[2] Citation is to Petition for Certiorari.

admission (G.Br. 4), Revenue Agent Fatten, who was also present, understood the question to mean that "the doctor was asking for a specific somebody to talk to" (App. 158)[3] Barrett refused to advise Petitioner whom he could call, but urged the doctor to confess. (App. 74, 395, 530, 578)

Dr. Lehman began to pace the hallway and Barrett soon returned to the patient records, and despite the doctor's prior "pleading", pulled a tray of cards and began to leaf through them (App. 74, 397, 582). Though the doctor "begged" him repeatedly not to go through any more cards, Barrett disregarded such request and continued to "leaf" through the tray repeating his demands and insinuations. (App. 74-75, 400, 583) In spite of Petitioner's requests that he stop, the agent pulled the final cards and checked their accuracy with the cash receipts book. For the third and last time Dr. Lehman "pleaded" for him to stop, but the agent's response was merely to "continue to press". (App. 75, 404, 586) A lull occurred and only then did the doctor allegedly confess.

Significantly, throughout this crucial period before his alleged confession, Dr. Lehman repeatedly denied any knowledge or wrongdoing. Something must have pressured him to retract these denials and confess. It is clear from this record that that something had to be the continuous pressure and the illegal actions of the agents.

[3] Barrett's courtroom interpretation was even contrary to his prior memory. During a second meeting with Dr. Lehman in September, 1966, he responded to the doctor's claim that he should have told him what to do during the June interview as follows: "I again reminded him that I am not allowed to tell him just who he should contact during the course of an interview or to recommend anyone to him as to what he should do." (App. 408)

The action by the Internal Revenue agents herein not only merited a reprimand from both lower courts but the Seventh Circuit additionally cautioned all law enforcement agents to avoid similar questionable conduct. (17a) It thus seems anomolous that the keystone of the government's case herein (8a), the evidence gleaned from such constitutionally obvious misconduct, should be viewed under the pretext of *de minimus non curat lex.*

Can such illegality be judged by some *de minimus* standard? What criteria should apply to determine when the Fourth Amendment bars the use of a confession which immediately follows an illegal search and seizure of records? We ask this Court to grant certiorari to review the judgment of the Court of Appeals for the Seventh Circuit for these reasons as well as those asserted in the Petition for Writ of Certiorari.

Respectfully submitted,

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